No. 89-321

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

CLYDE SANDOZ MASONRY CONTRACTORS, INC. AND GRIFFITH MASONRY, INC.,
Petitioners,

v.

JOHN T. JOYCE, TRUSTEE OF THE BRICKLAYERS AND TROWEL TRADES INTERNATIONAL PENSION FUND, ET AL.,
Respondents.

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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October 4, 1989

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BRIEF FOR PETITIONER IN REPLY

ARGUMENT

Certiorari is necessary because the lower court: "decided an important question of federal law which has not been, but should be, settled by this Court," S. Ct. R. 17.1(c); has in effect repealed the statute of limitations in MPPAA; and, has contravened the purposes of MPPAA.

1. A failure to make payments when demanded is not the only factor which gives rise to a cause of action

under MPPAA. Respondents have cavalierly ignored the statutory provision that a "substantial likelihood of inability to pay" also gives rise to a cause of action. *See* 29 U.S.C. § 1399(c)(5)(B). Respondents have also ignored that the funds are adversely affected at withdrawal. *See* 29 U.S.C. § 1001a(a)(4)(A).

2. Petitioner has never argued that its interpretation of the 6-year statute of limitation requires "either prompt collection or no collection." Brief in Opp. 5. Taking up to 6 years to collect is not prompt. The specific statutory mandate is that plan sponsors shall demand payment "as soon as practicable" after an employer's withdrawal. 29 U.S.C. § 1399(b)(1). The legislative intent and history that liability be expeditiously collected has also been ignored by Respondents.

3. Respondents suggest, as the lower court below held, that there are other incentives for expeditious collection. None worked here. For 6 years the Plan made *no effort whatsoever* to collect! Such "incentives" therefore are impractical, as demonstrated by this case. The only effective incentive is the interpretation of the statute of limitations urged by Petitioners.

4. Respondents also argue that Petitioners' assertion that a fund is adversely affected at the time of withdrawal is misleading. They suggest that "although future contributions cease upon withdrawal, so does the accrual of liabilities." Brief in Opp. 7. That argument totally ignores the purpose of MPPAA and the definition of "unfunded liabilities" for which withdrawal liability is assessed. Pet. 11. If there are unfunded liabilities at the time of withdrawal, it is current liabilities which are being claimed by assessment of a withdrawal liability to cover the payment in the future of vested benefits.

5. Respondents incorrectly assert that there is an inherent difficulty of determining when complete withdrawal has occurred. Respondents support that assertion by

stating: "A cessation of contributions in this industry [building and construction], where work is seasonal and transitory, simply does not indicate withdrawal." Brief in Opp. 8.

However, withdrawal is defined at the point in time when the obligation to contribute ceases, and either operations continue or there is a resumption of operations within 5 years – not at the point when contributions cease. 29 U.S.C. § 1383(b)(2). This is an easily determinable date. The applicable time is the time from which withdrawal liability accrues. 29 U.S.C. § 1381. Under any conceivable interpretation of the statute, the Plan cannot take 6 years to determine if there was a withdrawal. There simply is no "unwieldy collection mechanism." Either there was a continuation of operations, or a resumption of operations within 5 years (after contributions ceased). In either situation, the withdrawal date can easily be determined by the Fund. That date should trigger the running of the statute of limitations.

6. Petitioner did not ignore the lower court's holding that arbitration should resolve whether the Fund acted promptly to begin collecting any withdrawal liability. *See* Pet. 16 fn.1. Respondents argue that arbitrators can determine whether a fund which has delayed collection for more than 6 years, has fulfilled its statutory obligation to collect withdrawal liability "as soon as practicable." Leaving resolution of that issue to arbitrators all over the country will allow for disparate results, and would hamper uniformity in application. Moreover, leaving to arbitration a laches defense when the lower court has held the limitations period has not run simply makes no sense. *See* Pet. 16 fn.1.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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